Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar & Ors v Bursa Malaysia Securities Bhd

A

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1394–08 OF 2016
ROHANA YUSUF, UMI KALTHUM, HASNAH HASHIM JJCA
27 FEBRUARY 2020

C

Civil Procedure — Contempt of court — Committal proceedings — Appellants failed to obey order of High Court — Appellants' appeal to Court of Appeal was dismissed — Appellants' leave application to appeal to the Federal Court was dismissed — Respondent filed notice of application for order of committal against appellants pursuant to O 52 r 4 of the Rules of Court 2012 — High Court granted committal order but ordered monetary penalty instead of custodial sentence — Whether conviction and sentence in committal proceeding was wrongful — Whether sentence excessive — Whether High Court should impose custodial sentence instead of monetary penalty — Rules of Court 2012 O 52 r 4

D

E

The appellants were the former directors of Cepatwawasan Group Bhd, a company listed on the Main Board of Bursa Malaysia Bhd whereas the respondent was a stock exchange licensed under the Capital Markets and Services Act 2007. On 28 December 2010, the respondent had obtained an order from the High Court that within 30 days of the order, the first and second appellants, jointly and severally, restore to Cepatwawasan the RM13m paid to Opti Temasek Sdn Bhd; and that within 30 days of the order, the appellants, jointly and severally, restore to Cepatwawasan the RM3m paid to Sheikh Abdul Rahim ('the HC's order'). On appeal, the Court of Appeal upheld the HC's order save for the variation that all the payments and acts stated in the order shall be carried out within 30 days of the date of the Court of Appeal Order dated 16 August 2012 ('the COA's order'). The appellants' application for leave to appeal to the Federal Court was dismissed with costs on 28 February 2013. As the appellants failed to comply with the COA's order, the respondent, after obtaining leave from the High Court, filed a notice of application for an order of committal against the appellants pursuant to O 52 r 4 of the Rules of Court 2012 ('the ROC') in encl 48. Order of committal was granted, and the High Court ordered monetary penalty against the appellants. Dissatisfied with the High Court's decision, the appellants appealed against the committal order. On the other hand, the respondent filed a cross-appeal against the High Court's decision in imposing monetary penalty on the appellants instead of a custodial sentence. The appellants submitted that the conviction and sentence in the committal proceeding was wrongful and the sentence was excessive. With regards to the cross-appeal, the respondent submitted that custodial sentence would have been a proper sentence against the appellants as

F

G

H

I

A their disobedience was a continuing act.

Held, dismissing the appellants' appeal, and allowing the respondent's cross-appeal:

B (1) The committal proceedings were not the forum for the appellants to challenge the HC's order as varied by the COA's order. The appellants have had their opportunity to do so when they appealed against the said orders and had exhausted their rights to appeal against the said orders when the appellants' leave to appeal was dismissed by the Federal Court. C Hence, the appellants were estopped from any attempt to relitigate and to reargue their case on its merits in this appeal against the said orders (see para 33).

(2) The appellants, despite being fully aware of the terms of the said orders, D had in fact failed to obey the said orders. The lackadaisical and cavalier attitude of the appellants towards the observance of the said orders and the absence of any attempt to comply with the said orders were testament to the appellants' disobedience and defiance of the said orders, notwithstanding the ample time given for their compliance. This was in E fact clear acts of contempt as set out under O 52 r 4 of the ROC (see para 34).

(3) The appellants were recalcitrant despite having exhausted all the avenues to appeal their case by insisting on relitigating the matter in the contempt proceedings at the High Court as well as before the appellate court. Such F behaviour showcased a clear contempt of the court's proceedings and total disregard of the law applicable to them in these proceedings. Thus, a heavier sentence must be meted out by the court to reflect the seriousness of the offence committed by the appellants. The court agreed with the respondent that a custodial sentence was the more appropriate G sentence to match the gravity of the offence committed by the appellants. The imposition of fine was neither suitable nor appropriate in the given circumstances of the case before the court (see paras 36–37).

[Bahasa Malaysia summary

H Perayu-perayu adalah bekas pengarah Cepatwawasan Group Bhd, sebuah syarikat yang tersenarai di Papan Utama Bursa Malaysia Bhd manakala responden adalah bursa saham yang dilesenkan di bawah Akta Pasaran Modal dan Perkhidmatan 2007. Pada 28 Disember 2010, responden telah mendapat perintah dari Mahkamah Tinggi bahawa dalam tempoh 30 hari dari perintah I tersebut, perayu pertama dan kedua, secara bersama dan berasingan, mengembalikan kepada Cepatwawasan RM13 juta yang dibayar kepada Opti Temasek Sdn Bhd; dan bahawa dalam tempoh 30 hari dari perintah tersebut, para perayu, bersama-sama dan secara berasingan, mengembalikan kepada Cepatwawasan RM3 juta yang dibayar kepada Sheikh Abdul Rahim ('perintah

MT'). Atas rayuan, Mahkamah Rayuan mengekalkan perintah MT kecuali untuk variasi bahawa semua pembayaran dan tindakan yang dinyatakan dalam perintah tersebut akan dilakukan dalam tempoh 30 hari dari tarikh perintah Mahkamah Rayuan bertarikh 16 Ogos 2012 ('perintah MR'). Permohonan perayu untuk kebenaran memfailkan rayuan ke Mahkamah Persekutuan telah ditolak dengan kos pada 28 Februari 2013. Oleh kerana perayu tidak mematuhi perintah MR, responden, setelah mendapat kebenaran dari Mahkamah Tinggi, memfailkan notis permohonan untuk perintah komital terhadap perayu menurut A 52 k 4 Kaedah-kaedah Mahkamah 2012 ('KKM') dalam lampiran 48. Perintah komital dibenarkan, dan Mahkamah Tinggi memerintahkan denda terhadap perayu. Tidak berpuas hati dengan keputusan Mahkamah Tinggi, para perayu memfailkan rayuan terhadap perintah komital tersebut. Sebaliknya, responden memfailkan rayuan balas terhadap keputusan Mahkamah Tinggi dalam menjatuhkan hukuman dalam bentuk denda ke atas perayu dan bukannya hukuman penjara. Perayu-perayu berhujah bahawa sabitan dan hukuman dalam prosiding komital tersebut salah dan hukuman tersebut adalah berlebihan. Berkenaan dengan rayuan balas, responden menyatakan bahawa hukuman penjara adalah hukuman yang lebih sesuai terhadap perayu kerana ketidaktaatan mereka adalah tindakan yang berterusan.

Diputuskan, menolak rayuan perayu-perayu dan membenarkan rayuan balas responden:

(1) Prosiding komital bukanlah forum bagi para perayu untuk mencabar perintah MT seperti yang diubah oleh perintah MR. Perayu telah berkesempatan untuk melakukannya ketika mereka memfailkan rayuan terhadap perintah tersebut dan telah habis hak mereka untuk memfailkan rayuan terhadap perintah tersebut ketika permohonan untuk kebenaran untuk merayu oleh perayu ditolak oleh Mahkamah Persekutuan. Oleh itu, perayu-perayu terhalang dari melakukan apa-apa percubaan untuk membicarakan dan menghujahkan semula kes mereka di atas merit kes tersebut di dalam rayuan ini bertentangan dengan perintah-perintah tersebut (lihat perenggan 33).

(2) Perayu-perayu, walaupun telah mengetahui sepenuhnya terma-terma perintah-perintah tersebut, masih gagal mematuhi perintah-perintah tersebut. Sikap perayu yang tidak bertanggungjawab dan curang terhadap pematuhan perintah-perintah tersebut dan tidak adanya apa-apa percubaan untuk mematuhi perintah-perintah tersebut merupakan bukti ketidakpatuhan dan pelanggaran perayu-perayu terhadap perintah-perintah tersebut, walaupun terdapat cukup masa yang diberikan untuk mereka mematuhi perintah-perintah tersebut. Ini sememangnya merupakan tindakan penghinaan yang jelas seperti yang dinyatakan di bawah A 52 k 4 KKM (lihat perenggan 34).

(3) Perayu-perayu masih berkobar-kobar walaupun telah menghabiskan semua jalan untuk memfailkan rayuan ke atas kes mereka dengan berkeras untuk membicarakan semula permasalahan tersebut dalam prosiding penghinaan di Mahkamah Tinggi dan juga di hadapan Mahkamah Rayuan. Tingkah laku tersebut menunjukkan penghinaan yang jelas terhadap prosiding mahkamah dan pengabaian sepenuhnya terhadap undang-undang yang terpakai ke atas mereka dalam prosiding ini. Oleh itu, hukuman yang lebih berat mesti dijatuhkan oleh mahkamah untuk menggambarkan betapa seriusnya kesalahan yang dilakukan oleh perayu. Mahkamah bersetuju dengan responden bahawa hukuman penjara adalah hukuman yang lebih sesuai untuk menandingi keseriusan kesalahan yang dilakukan oleh perayu-perayu. Perintah hukuman denda adalah tidak sesuai dan tidak memadai dalam keadaan kes di hadapan mahkamah ini (lihat perenggan 36–37).]

Cases referred to

Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor [1997] 2 MLJ 472, CA (folld)

Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 11, 21, 360(1)(c)(i), (1)(A), (1)(K)

Rules of Court 2012 O 52 r 4

Appeal from: Originating Summons No D-24NCC-168 of 2010 (High Court, Kuala Lumpur)

Jasbeer Singh a/l Banta Singh (Nur Hakimah bt Mohamad with him) (Jasbeer Nur & Lee) for the appellants.

Preetha Pillai (Nimalan Devaraja with her) (Skrine) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] The appellants/the first, second and fourth defendants (collectively referred to as the 'defendants') were the former directors of Cepatwawasan Group Bhd ('Cepatwawasan'), a company listed on the Main Board of Bursa Malaysia Bhd.

[2] The respondent/plaintiff is Bursa Malaysia Securities Bhd which is a stock exchange licensed under the Capital Markets and Services Act 2007 ('Act 671'). The respondent/plaintiff has, among others, a statutory duty under ss 11

and 21 of the Act to ensure a fair and orderly market for the securities traded through its facilities.

[3] For ease of reference parties will be referred to as they were in the High Court.

[4] The plaintiff had on 28 December 2010 obtained an order from the High Court of Malaya in Kuala Lumpur vide Originating Summons No D-24NCC-168 of 2010 against the defendants ('High Court order dated 28 December 2010').

[5] The High Court order dated 28 December 2010 in the main are as follows:

(a) that within 30 days of the High Court order, the first and second defendants, jointly and severally, restore to Cepatwawasan the RM13m paid to Opti Temasek Sdn Bhd; and

(b) that within 30 days of the High Court order, the defendants, jointly and severally, restore to Cepatwawasan the RM3m paid to Sheikh Abdul Rahim.

[6] The defendants (including the third defendant) appealed to this court against the High Court order dated 28 December 2010 and this court upheld the High Court order dated 28 December 2010 on 16 August 2012 vide Civil Appeal No W-02-(NCC)-89 of 2011 ('Court of Appeal order dated 16 August 2012'), save for the variation that all the payments and acts stated in the order shall be carried out within 30 days of the date of the Court of Appeal order dated 16 August 2012.

[7] The defendants filed an application to the Federal Court for leave to appeal vide Federal Court Civil Application No 08(i)-702–09 of 2012. The leave application was dismissed with costs on 28 February 2013.

[8] As the defendants failed to comply with the Court of Appeal order dated 16 August 2012, on 5 November 2014, the plaintiff, after obtaining leave from the High Court, filed a notice of application for an order of committal against the defendants pursuant to O 52 r 4 of the Rules of Court 2012 ('the ROC') in encl 48.

[9] Enclosure 48 was heard before the learned High Court judge and the learned High Court judge granted the order for committal on 24 March 2016. The matter was then adjourned to another date for parties to submit on the issue of sentencing.

[10] On 1 July 2016, the learned High Court judge pronounced the sentence against the defendants as follows (the order for committal and sentence collectively referred to as 'committal order'):

(a) a fine of RM2m imposed on the first appellant/first defendant to be paid within 90 days from 1 July 2016 and, in default of payment, 30 days imprisonment;

(b) a fine of RM2m imposed on the second appellant/second defendant to be paid within 90 days from 1 July 2016 and, in default of payment, 30 days imprisonment; and

(c) a fine of RM100,000 imposed on the third appellant/fourth defendant to be paid within 90 days from 1 July 2016 and, in default of payment, 14 days imprisonment.

[11] Aggrieved by the committal order, the defendants filed an appeal to this court (the present appeal) on 26 July 2016.

[12] On 15 September 2016, the plaintiff filed a cross-appeal against the learned High Court judge's decision dated 1 July 2016 to impose a monetary penalty on the defendants instead of a custodial sentence. We have heard both the appeal and cross-appeal together.

BACKGROUND FACTS

[13] The facts that led to the filing of encl 48 are as follows. The defendants, who were the directors of Cepatwawasan at the material time, had from 8 July 2004 to 5 August 2004 caused Prolific Yield Sdn Bhd ('Prolific Yield'), a wholly owned subsidiary of Cepatwawasan, to make payments of RM16m to a company called Opti Temasek Sdn Bhd and one individual by the name of Sheikh Abdul Rahim.

[14] Such payments were in violation of the provisions of the Listing Requirements of Bursa Malaysia ('listing requirements'), specifically section 16.11(a), a provision relating to financial assistance.

[15] The plaintiff then issued a notice to show cause dated 12 July 2005 against the defendants. On 13 October 2005, the plaintiff's listing committee made a finding that the defendants had breached the listing requirements and the listing committee imposed penalties against the defendants under s 360(1)(c)(i), (1)(A) and (1)(K) of Act 671. The defendants alleged that they had no knowledge and were never informed of this matter and were only aware of the abovementioned hearing through advertisements in newspapers.

[16] The defendants appealed to the appeals committee of the plaintiff against the decision of the listing committee raising, among others, on the allegations of sub judice due to a pending civil suit in Kuala Lumpur High Court Civil Suit No D3–22–1168 of 2004.

[17] On 12 June 2006, after having heard the submissions of the defendants' counsel, the appeals committee dismissed the defendants' appeal.

[18] Subsequently, on 14 June 2006, the defendants filed a judicial review application at the Kuala Lumpur High Court vide Judicial Review Application No R1–25–270 of 2006 to challenge the decision of the appeals committee.

[19] On 18 January 2010, the Kuala Lumpur High Court dismissed the judicial review application with costs. The defendants appealed to this court against the aforesaid decision and the appeal was also dismissed on 19 March 2013. There was no application for leave to appeal filed at the Federal Court.

[20] The plaintiff subsequently on 26 May 2010 filed Originating Summons No D-24NCC-168 of 2010 to enforce the penalties imposed by the listing committee on 13 October 2005 which was later affirmed by the plaintiff's Appeals Committee on 12 June 2006. The originating summons was allowed with costs on 28 December 2010 ('the High Court order dated 28 December 2010'). The gist of the High Court order dated 28 December 2010 are stated in para 5 above.

[21] The defendants then appealed to this court, which dismissed their appeal and affirmed the High Court order dated 28 December 2010 save for a slight variation where this court varied the said High Court order by providing that all the payments and acts stated in the said High Court order shall be carried out within 30 days of the date of this court's order dated 16 August 2012. The leave application to the Federal Court was dismissed by the Federal Court on 28 February 2013.

[22] Thereafter the plaintiff then filed encl 48 application and its outcome as referred to in paras 8–12 above.

THE APPEAL

[23] The defendants submitted to this court that there was a Civil Suit No D3-22–1168 of 2004 filed by Cepatwawasan ('Suit 1168') which the defendants alleged that the plaintiff had full knowledge of.

[24] Suit 1168 was a proceeding against 18 defendants, which includes the defendants in this appeal. Suit 1168, inter alia, sought for:

A (a) the sum of RM16m from the first to fourth defendants and the fourth to 17th defendants;

(b) the sum of RM13m from the fifth to seventh defendants and ninth to 13th defendants;

B (c) the sum of RM4m from the eighth defendant; and

(d) interest.

[25] The defendants submitted that the parties, including the defendants, C themselves in Suit 1168 had entered into a consent judgment dated 29 October 2010 ('consent judgment') and the salient terms of the consent judgment are as follows:

(a) The first defendant shall pay to the first plaintiff the sum of RM3,000,000.00 as full and final settlement of the aforementioned suit ('Suit') and the payment of RM3,000,000.00 shall be effected in the following manner: D

(i) the first defendant is to pay the sum of RM1,000,000 to the first plaintiff on the fourth November 2010;

E (ii) the first defendant is to pay a further sum of RM2,000,000 to the first plaintiff within the period of six (6) months from the date of this consent judgment ('second payment').

(b) The Suit shall be withdrawn by the plaintiffs against the first defendant to the 18th defendant with no order as to costs and without liberty to file F afresh;

(c) This consent judgment is entered into without any admission of liability on the part of all the defendants.

G **[26]** The defendants argued that the learned High Court judge had erred in law and in fact when he failed to consider that Suit 1168 and Originating Summons No D-24NCC-168 of 2010 both sought similar reliefs. The fact that the defendants had complied with the terms of the consent judgment made the conviction and the sentencing against the defendants in the H committal proceedings to be wrongful. The defendants went on to suggest that even the committal proceedings itself should not have been allowed in the first place.

I **[27]** The defendants also submitted that the sentence meted out by the learned High Court judge were excessive and did not commensurate with the nature of the alleged non-compliance of the High Court order dated 28 December 2010. The defendants further submitted that the sentence passed

by the learned High Court judge failed to consider that the first defendant is a bankrupt and therefore the amount of RM2m imposed as fine was excessive and unreasonable.

[28] At the same time, the plaintiff submitted that there has been a non-compliance by the defendants of the High Court order dated 28 December 2010 and as affirmed and varied by the Court of Appeal order dated 16 August 2012.

[29] The plaintiff also submitted that the reasons given by the defendants to justify their non-compliance of the said orders had already been considered and dismissed in the substantive judicial review application and the enforcement proceedings. These alleged reasons or justification, it was submitted, were no answers to the committal proceedings before the High Court. The plaintiff relied on the doctrine of estoppel to stop the defendants from rehashing the same issues that had been considered and dismissed in the judicial review and enforcement proceedings.

[30] As for the plaintiff's cross-appeal on the sentence passed by the learned High Court judge, the plaintiff argued that custodial sentence would have been a proper and more appropriate sentence against the defendants as their disobedience is a continuing act.

OUR DECISION

[31] The principles of law pertaining to contempt of court had been set out in the Supreme Court decision of *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 as per Abdul Hamid Omar (LP) (as he then was) at p 220:

> Obedience to court order
>
> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

[32] It was apparent to us that the defendants have unabashedly failed to comply with the High Court order dated 28 December 2010 and as varied by the Court of Appeal order dated 16 August 2012.

[33] The committal proceedings were not the forum for the defendants to challenge the High Court order dated 28 December 2010 and as varied by the Court of Appeal order dated 16 August 2012. The defendants have had their

opportunity to do so when they appealed against the said decisions/orders and have exhausted their rights to appeal against the said decisions/orders when the defendants' leave to appeal was dismissed by the Federal Court. Hence, the defendants were estopped from any attempt to relitigate and to reargue their case on its merits in this appeal against the said decisions/orders.

[34] To date, and in the absence of any stay order, the High Court order dated 28 December 2010 and as varied by the Court of Appeal order dated 16 August 2012 stand as they are. Thus, we were of the view that the defendants, despite being fully aware of the terms of the said orders, had in fact failed to obey the said courts' orders and had failed to carry out the necessary acts within the stipulated time frame provided by the said orders. The lackadaisical and cavalier attitude of the defendants towards the observance of the said courts' orders and the absence of any attempt to comply with the said orders are testament to the defendants' disobedience and defiance of the said courts' orders, notwithstanding the ample time given for their compliance. We were of the view that this was in fact clear acts of contempt as set out under O 52 r 4 of the ROC.

[35] In respect of the plaintiff's cross-appeal, we were guided by the decision of this Court in *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor* [1997] 2 MLJ 472, as per Gopal Sri Ram (JCA)(as he then was) at p 486:

> ... However, it is axiomatic that when it comes to sentence, subject to the questions of policy, each case must be dealt with according to its own facts.
>
> ... The sentence passed should, apart from reflecting the gravity of the particular offence, act as a deterrent to would-be violators of injunctions ...

[36] We were of the view that the defendants were recalcitrant despite having exhausted all the avenues to appeal their case by insisting on relitigating the matter in the contempt proceedings at the High Court as well as before us. Such behaviour showcased a clear contempt of the court's proceedings and total disregard of the law applicable to them in these proceedings.

[37] Thus, we were of the view that a heavier sentence must be meted out by this court to reflect the seriousness of the offence committed by the defendants. We agreed with the submission of the learned plaintiff's counsel that a custodial sentence is the more appropriate sentence to match the gravity of the offence committed by the appellants. We viewed the imposition of fine was neither suitable nor appropriate in the given circumstances of the case before us.

CONCLUSION

[38] Thus, having given our consideration to all the submissions of parties, we found no merits in the defendants' appeal and therefore we unanimously dismissed the defendants' appeal on the finding of liability of all the defendants by the High Court. We agreed with the findings of the learned High Court judge that both the orders of the High Court dated 28 December 2010, as affirmed and varied by the Court of Appeal order dated 16 August 2012, have not been complied with by the defendants. We therefore affirmed that part of the High Court order dated 1 July 2016.

[39] In respect of the defendants' appeal against sentence and the plaintiff's cross-appeal on the same, we found there were merits in the cross-appeal based on our findings as we had referred to earlier and we thereby unanimously allowed the cross-appeal and dismissed the defendants' appeal on the sentence. We therefore set aside that part of the High Court order dated 1 July 2016 and we substituted it with the following orders:

(a) the defendants/appellants shall comply with the orders of the High Court dated 28 December 2010, as affirmed and varied by the Court of Appeal order dated 16 August 2012, within three months from 13 February 2017;

(b) in default of the above, we imposed the sentence of imprisonment on the respective defendants/appellants as follows:

(i) for the first defendant/first appellant (Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar), five years imprisonment from the expiry of the three month period;

(ii) for the second defendant/second appellant, (Lt Kol Tengku Dato' Kamarul Zaman Ibni Al Marhum Sultan Sir Abu Bakar), five years imprisonment from the expiry of the three-month period;

(iii) for the fourth defendant/third appellant (Abdul Rahim bin Sendiri), one year imprisonment from the expiry of the three month period,

or upon the said defendants/appellants purging their contempt in accordance with the terms of the order of the High Court dated 28 December 2010, as affirmed and varied by the order of the Court of Appeal dated 16 August 2012, whichever is earlier.

A *Appellants' appeal dismissed; respondent's cross-appeal allowed.*

Reported by Dzulqarnain Ab Fatar

B

C

D

E

F

G

H

I